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**Regulatory Affairs**

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February, 20 2002

*By Courier*

Docket Management System  
U.S. Dept of Transportation  
Room PL-401,  
499 Seventh Street SW  
Washington D.C. 20590-0001

Dear Sir/Madam:

**Re: Docket Number FRA 2001-8728, Notice Number 1, 49 CFR Part 241, RIN 2130-AB38,  
U.S. Locational Requirement for Dispatching of U.S. Rail Operations**

During CN's appearance at the February 12, 2002 public hearing on this issue, we were asked to provide supplemental information for the docket on a couple of specific issues. These were (1) specifics on the Ontario Court of Appeals decision referred to in our comments on drug and alcohol testing, and (2) an indication on the number of physicians which have reported medical concerns regarding safety critical employees to the Railway's Chief Medical Officer under the new Canadian Railway Medical Rules and Section 35 of the Canadian Railway Safety Act.

For these two issues, we offer the following information:

**Ontario Court of Appeals Decision:**

In CN's February 8, 2002 comments on the interim rule, under the section concerning drug and alcohol testing, CN refers to the fact that the Railroad does not have random testing as part of its company policy for Canadian Employees due to the requirements of the Canadian Human Rights Act. The submission adds "Although this has been modified by a recent Court of Appeals decision, it had not been tested in the railway context."

The decision cited in our submission was that involving Martin Entrop vs. Imperial Oil. In a July 2000 decision, the Ontario Court of Appeal ruled that under specific circumstances, random alcohol testing for safety sensitive positions is not illegal.

A summary on the Ontario Human Rights Commission web site provides the following:

*Entrop v. Imperial Oil - Ontario Court of Appeal Decision: July 21, 2000*

*Martin Entrop had been employed by Imperial Oil Limited for 18 years when the company's new "Alcohol and Drug Policy" came into effect. In accordance with the policy, Entrop was required to disclose that, some years before, he had had an alcohol problem. As a consequence of this forced disclosure, Entrop was removed from his safety-sensitive job to a less desirable job. He was later reinstated but found himself subjected to more rigorous management supervision than before his disclosure. He was also required to make frequent declarations as to his sobriety in order to keep his job. Entrop filed a complaint with the Commission alleging that he had been discriminated against on the basis of a handicap and that he had been subject to reprisal.*

*Result at Board of Inquiry: In a series of separate decisions, the Board made a number of rulings. The key decision was the Board's determination that the drug-testing programs employed by Imperial Oil had the effect of discriminating against persons who were substance abusers on the basis of their handicap or perceived handicap.*

*Result at the Court of Appeal: The Court held that in cases of adverse affect discrimination, the unified approach and the three-step test adopted by the Supreme Court of Canada in Meiorin should be applied. The three-step test requires that:*

- i. the rule is rationally justified;*
- ii. the rule is bona fide; and*
- iii. the standard is reasonably necessary to the accommodation of that legitimate work-related standard.*

*To succeed on the last step, an employer must prove that accommodation is impossible or will cause undue hardship.*

*The Court also confirmed that substance abuse is a handicap and thus the policy was prima facie discriminatory. The drug testing provision violated the Code because it could not accurately measure impairment. The Court held further that random alcohol testing would not satisfy the Meiorin test unless Imperial Oil took steps to accommodate those who tested positive, including less severe sanctions than dismissal and providing the necessary support to permit treatment. Finally, the Court held that the requirement of disclosure of a past abuse problem was unreasonable.*

*Current status: The decision was not appealed.*

Of significance is that the decision does not address random drug testing, for which the link between presence in the body and impairment is not as well defined. It is also not based on the requirements of a transportation or railroad industry. The full text of the decision can be found at <http://www.ontariocourts.on.ca/decisions/2000/july/entrop.htm>

### **Railway Safety Act and Medical Rule reports**

As part of its submission, CN referred to the fact that the Canadian Railway Safety Act (RSA) requires that physicians treating persons in Railway Safety Critical Positions, such as Train Dispatchers, report to the Railway's Chief Medical Officer any concerns that they may have regarding medical conditions that may affect the person's ability to safely perform their duties.

To assist in this regard, the Canadian railway industry has developed a series of specific medical guidelines covering conditions such as vision, hearing, diabetes, epilepsy, cardiovascular and mental disorders. These guidelines were developed by medical experts in each respective field and are tailored to the specifics of railroad operation

The existence of the new Medical Rule and guidelines has been communicated to the medical community in Canada with the assistance of the Canadian Medical Association (CMA). The CMA have published articles concerning the new rule in their journal and have helped with the distribution of a special brochure for the medical community which explains the new rule as well as the specific role and obligations of doctors and physicians. A copy of the brochure is attached.

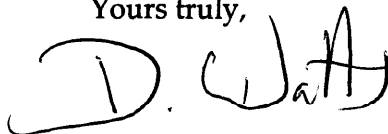
At the February 12, 2002 public hearing, CN was asked to determine how many reports from physicians the Railway has received since the new rule went into effect.

In speaking to CN's Chief Medical Officer, it is our understanding that, between CN and the Railway Association of Canada, we have been approached by physicians on at least 15 occasions requesting specific medical guidelines so that they may better assess the fitness for duty of an employee. This is particularly encouraging since the Rule has only been in effect since November 29, 2001, a period of 10 weeks that included the Christmas and New Years holidays.

Although it is impossible to determine how many of these ultimately resulted in specific reports to the CMO, it is known that CN has received a number of physician's reports recommending restrictions on employee's duties either as part of the medical fitness determination associated with periodic medicals or as assessments connected with claims for short term Worker Indemnity Benefits.

We trust that this information addresses the additional questions that you had and will help you in your review of CN's comments on the interim rule. Should you have any additional questions, please contact me at 514-399-4589.

Yours truly,

A handwritten signature in black ink, appearing to read 'D. Watts', with a stylized flourish at the end.

D. E. Watts  
Director - Regulatory Affairs

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# **The Railway Safety Act:**

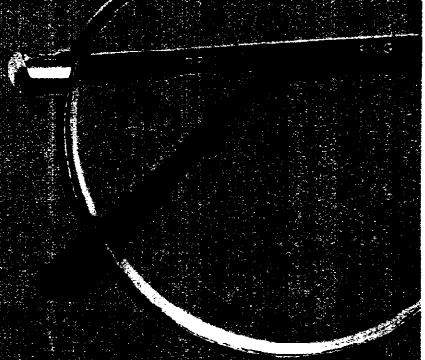
## **A Guide to Mandatory Reporting for Physicians and Optometrists**



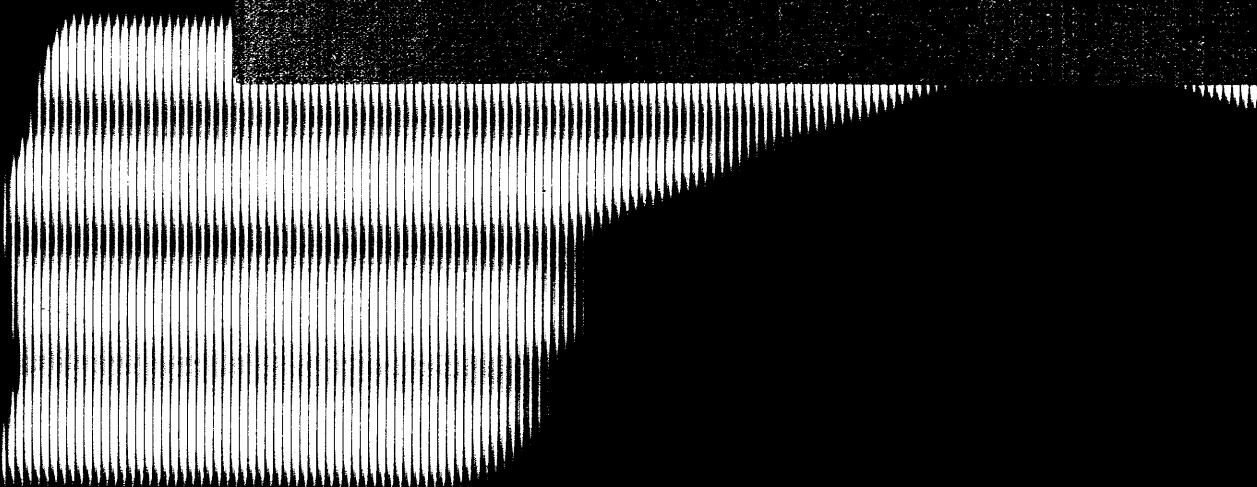
**RAC**

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Recent changes to the Railway Safety Act (RSA) require railway employees working in Safety Critical Positions to inform their physician or optometrist, prior to any examination, that they do such work. These employees are directly engaged in the operation of trains, including rail traffic control. The RSA also requires the physician or optometrist to immediately notify both their patient and the railway company if the employee has a medical condition that may reasonably pose a threat to railway safety.



## Railway Safety Act?

fety Act is federal legislation that in over railway safety matters to Transport. The RSA is regulated anada, and covers railway safety, environment. ly, legislated medical require- ain railway operating positions ards for vision and hearing only. dical requirements for employees the individual railways as a matter cy. on that other medical standards d hearing should also be governed ose in the late 1980's following a ion where an employee's medical possible contributing factor.

## What provisions of the Railway Safety Act affect Physicians and Optometrists?

- Section 35 of the RSA mandates regular medical examinations for all persons occupying safety critical positions and:
- requires that physicians and optometrists must notify the railway company's Chief Medical Officer if a person occupying a safety critical position has a medical condition that could be a threat to safe railway operations and that the physician or optometrist send a copy of this notice without delay to the patient;
  - places the responsibility on the patient to inform the physician or optometrist that he or she holds a designated safety critical position at the time of any examination;
  - allows the railway company to use the information provided by the physician or optometrist in the interest of safe railway operations;
  - prohibits any legal, disciplinary or other proceedings against a physician or optometrist for such information given in good faith, and;
  - prohibits further disclosure, or use as evidence, of such medical information, except with the permission of the patient.

### **Safety Critical Positions?**

Safety Critical Positions, as designed by the Railway Rules Governing Safety Operations, operate, or control the movements. They represent approximately 10% of the workers in Canada. These positions have a direct role in safe railway operations and performance due to a medical condition could result in a significant incident affecting the health and safety of employees, the public, or the environment.

Operations included in Safety Critical Positions vary between railways, but typically include:

- Engineer;
- Conductor (Brake person);
- Yardman (Yard person), and;
- Train Controller (Train Dispatcher).

Any employee or contractor who is required to perform any of these functions will be required to occupy a Safety Critical Position.

### **What are the Railway Medical Rules for Safety Critical Positions?**

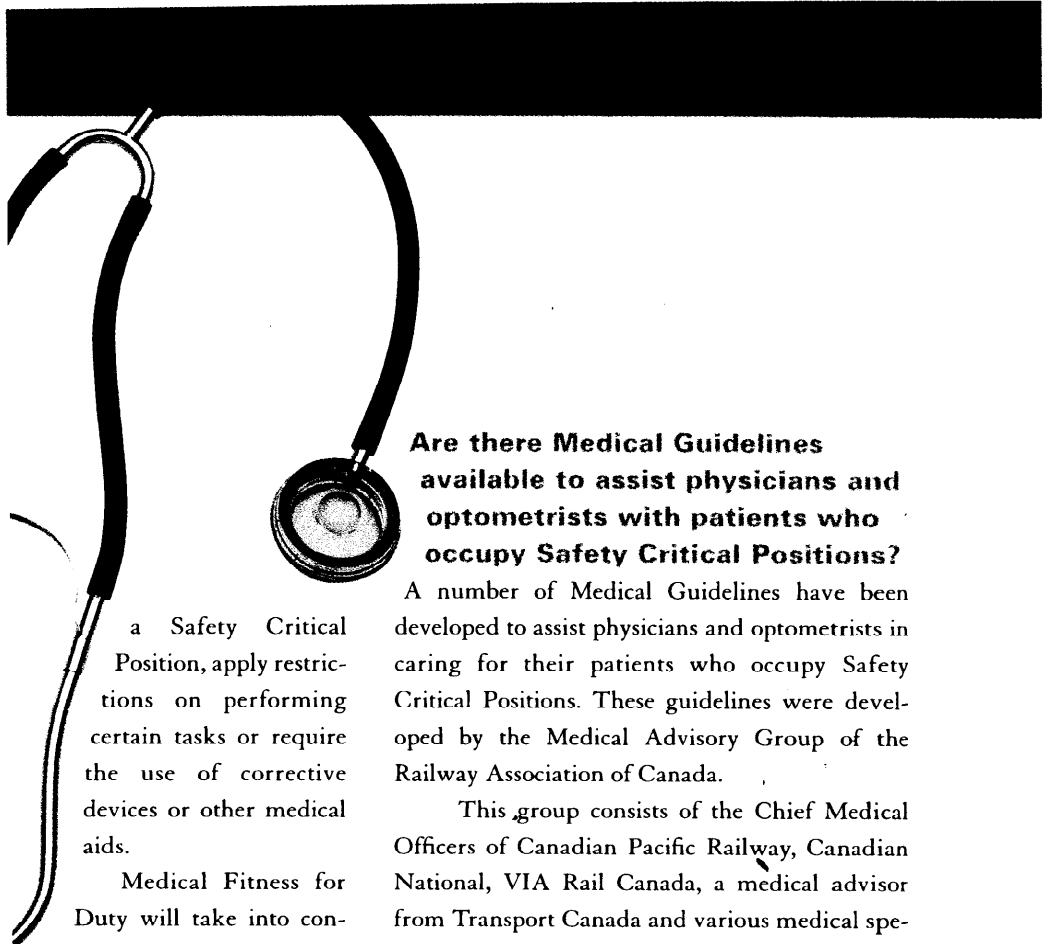
Railway Medical Rules for Positions Critical to Safe Railway Operations were developed by the Medical Steering Committee of the Railway Association of Canada and have been approved by Canada's Minister of Transport.

The goal of the Medical Steering Committee was to develop rules that set out the requirements for the frequency of medical assessments and also allow for the individual assessment of Medical Fitness for Duty. The new Medical Rules represent a significant change in the way medical fitness for duty is determined in the Canadian railway industry and increase the involvement of the treating physicians and optometrists in the process.

The required minimum frequency for Medical Fitness for Duty assessments is every five years until the age of 40 and every three years thereafter as long as an employee occupies a Safety Critical Position.

With the information provided by the employee's treating physician or optometrist, the Chief Medical Officer of each railway company may require an increase in the frequency of medical assessments, restrict a person from occupying





**Are there Medical Guidelines available to assist physicians and optometrists with patients who occupy Safety Critical Positions?**

A number of Medical Guidelines have been developed to assist physicians and optometrists in caring for their patients who occupy Safety Critical Positions. These guidelines were developed by the Medical Advisory Group of the Railway Association of Canada.

This group consists of the Chief Medical Officers of Canadian Pacific Railway, Canadian National, VIA Rail Canada, a medical advisor from Transport Canada and various medical specialists. The guidelines are reviewed and updated regularly. The following guidelines are available:

- Hearing;
- Vision;
- Epilepsy;
- Cardiovascular Disorders;
- Diabetes, and;
- Mental Disorders.

Additional Medical Guidelines will be developed. Medical conditions not currently covered by a specific guideline will be governed by accepted medical practice.

When a Safety Critical Position, apply restrictions on performing certain tasks or require the use of corrective devices or other medical aids.

Medical Fitness for Duty will take into consideration medical conditions including treatment and past and current, that could

actual impairment of cognitive including alertness, judgment, memory and concentration; impairment of senses; impairment of musculoskeletal

condition that is likely to constitute a hazard to railway operations.

responsible for the costs  
medical assessments and  
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ts incurred as a result of these Medical  
covered by the provincial health care  
e paid by the employer in accordance  
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oy of the various Medical  
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## Acknowledgments

This guide for physicians and optometrists was prepared by the Medical Advisory Group of the Railway Association of Canada, and distributed with the cooperation of the Canadian Medical Association, the Canadian Association of Optometrists and Transport Canada, to facilitate public safety in rail freight and passenger train operations across Canada.

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Le monde est un village et le monde est un village.  
Le monde est un village et le monde est un village.  
Le monde est un village et le monde est un village.  
Le monde est un village et le monde est un village.

**RAC**

Transport Canada  
Transport Canada

**La Loi sur la sécurité ferroviaire :**

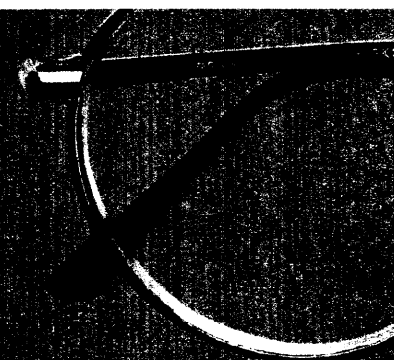
**Un guide de la déclaration  
obligatoire pour les médecins et  
les optométristes**



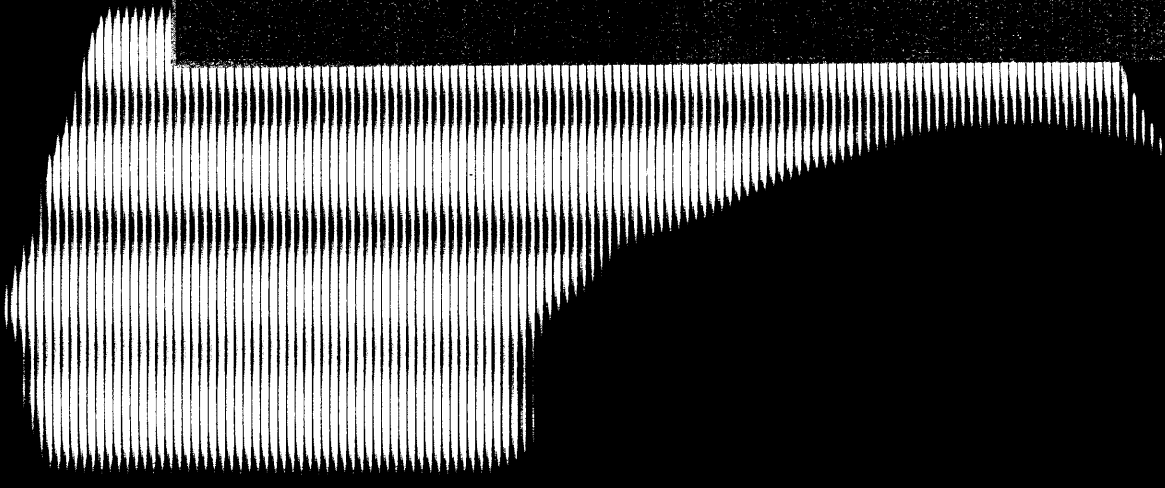
**ACFC**

Transports  
Canada

Transport  
Canada



Les récentes modifications apportées à la *Loi sur la sécurité ferroviaire* (LSF) obligent les employés de chemin de fer titulaires de postes essentiels à la sécurité ferroviaire à révéler à leur médecin ou à leur optométriste, avant l'examen, la nature du poste qu'ils occupent. Ces employés sont ceux qui assurent directement la marche des trains et le contrôle de la circulation ferroviaire. La LSF oblige par ailleurs le médecin ou l'optométriste à aviser immédiatement son patient et la compagnie de chemin de fer lorsque l'état de santé de l'intéressé risque de compromettre la sécurité ferroviaire.



## e la loi sur la sécurité

rité ferroviaire est une loi fédérale qui  
de sécurité ferroviaire sous l'autorité  
ansports. Administrée par Transports  
traite de la sécurité, ferroviaire ou  
onnement.

es obligations médicales applicables  
'exploitation ferroviaire se limitaient  
sécurité visuelle et auditive. Les autres  
ales étaient régies par les politiques  
chemin de fer.  
les années 1980, par suite d'une colli-  
ait été en partie imputable à l'état de  
yé, on a senti le besoin d'ajouter  
édicales à l'acuité visuelle et auditive  
églement.

Par quelles dispositions de la loi sur la  
sécurité ferroviaire les médecins et les  
optométristes sont-ils touchés?

L'article 35 de la LSF oblige tous les titulaires de postes  
essentiels à la sécurité à passer des examens médicaux à  
intervalles réguliers et :

- prévoit que les médecins et les optométristes sont  
tenus d'avertir le médecin-chef de la Compagnie  
lorsque l'état de santé d'un titulaire de poste essen-  
tiel à la sécurité risque de compromettre la sécurité  
de l'exploitation ferroviaire; par ailleurs le médecin  
ou l'optométriste doit sans délai envoyer une copie  
de l'avis au patient;
- impose au titulaire d'un poste désigné essentiel à la  
sécurité d'aviser le médecin ou l'optométriste de la  
nature du poste qu'il occupe au moment de l'examen;
- permet à la compagnie d'utiliser l'information  
fournie par le médecin ou l'optométriste pour  
préserver la sécurité de l'exploitation ferroviaire;
- interdit toute procédure judiciaire, disciplinaire ou  
autre contre un médecin ou un optométriste par  
suite de la divulgation de bonne foi de cette infor-  
mation; et
- interdit la divulgation ultérieure, ou l'utilisation  
comme preuve, de cette information médicale, sous  
réserve du consentement du patient.

**les postes essentiels à la  
roviaires?**  
**Qu'est-ce que le Règlement médical  
pour les postes essentiels à la sécurité  
ferroviaire?**

Le Règlement médical pour les postes essentiels à la sécurité ferroviaire a été élaboré par le comité directeur médical de l'Association des chemins de fer du Canada et approuvé par le ministre des Transports du Canada. Le comité directeur médical avait pour objectif d'élaborer des règles qui établissent les exigences relatives à la fréquence des évaluations médicales et de permettre l'évaluation sur une base individuelle de l'aptitude médicale à exécuter des tâches. Le nouveau Règlement médical modifie de façon notable le mode d'évaluation de l'aptitude médicale à exécuter des tâches dans le secteur ferroviaire canadien et élargit le rôle des médecins traitants et des ophtométristes à cet égard. Tant qu'il occupe un poste essentiel à la sécurité, l'employé doit se soumettre à une évaluation de l'aptitude médicale à exécuter des tâches tous les cinq ans jusqu'à l'âge de 40 ans et tous les trois ans par la suite. Compte tenu de l'information fournie par le médecin-traitant ou l'ophtométriste, le médecin-chef de chaque compagnie de chemin de fer peut exiger une augmentation de la fréquence des évaluations médicales, interdire à une personne d'occuper un poste essentiel à la sécurité, appliquer des restrictions à l'exécution de certaines tâches ou exiger l'utilisation d'appareils correcteurs ou d'autres accessoires médicaux.

essentiels à la sécurité.  
fonctions susmentionnées sera réputé  
employé ou entrepreneur appelé à  
trains)  
la circulation ferroviaire  
de triage (agent de manœuvre)  
adjoind (serre-frein)  
e locomotive  
l'autre, mais ce sont généralement les  
tels à la sécurité peuvent varier d'un  
causer des dommages matériels ou à  
et à la sécurité du personnel et  
quer un grave incident susceptible de  
ient dû à l'état de santé du titulaire  
xploitation ferroviaire en ce sens qu'un  
ail de ces personnes a un effet direct sur  
personnes occupent de tels postes au  
essentiels à la sécurité ferroviaire.  
is ou reliés au contrôle de la circulation  
aire, les postes directement liés à la  
ient concernant les postes essentiels à la

# **Y a-t-il des lignes directrices médicales pour aider les médecins et les optométristes ayant des patients titulaires de postes essentiels à la sécurité?**

Des lignes directrices médicales ont été élaborées pour aider les médecins et les optométristes à traiter les patients titulaires de postes essentiels à la sécurité. Celles-ci ont été élaborées par le groupe consultatif médical de l'Association des chemins de fer du Canada. Ce groupe est constitué des médecins-chefs du Chemin de fer Canadien Pacifique, du Canadien National et de Via Rail Canada, d'un conseiller médical de Transports Canada et de divers spécialistes médicaux. Les lignes directrices sont revues et mises à jour régulièrement. Celles qui ont été rédigées jusqu'ici portent sur les sujets suivants :

- Audition
- Vision
- Épilepsie
- Troubles cardio-vasculaires
- Diabète
- Troubles mentaux

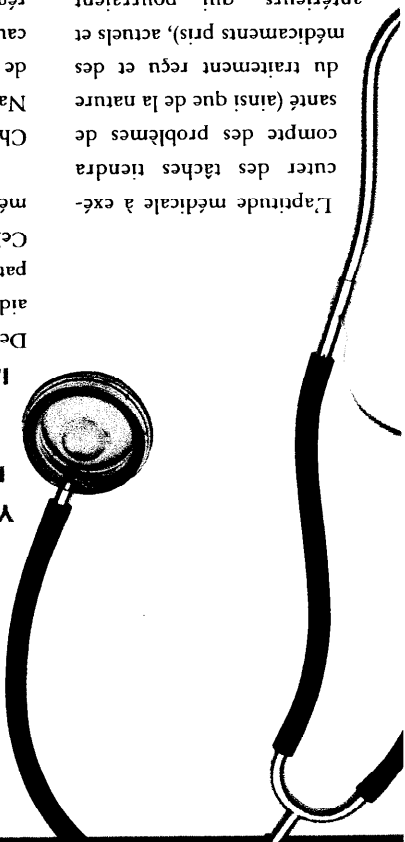
D'autres lignes directrices médicales seront élaborées. Les problèmes médicaux ne faisant pas l'objet d'une ligne directrice en particulier seront assujettis à la pratique médicale acceptée.

ance qui risque de constituer une écurité ferroviaire.

significative de la fonction musculo- des sens,

lucidité, de la mémoire et de la re, notamment de la vigilance, du soudaine ou progressive de la entraîner :

antérieurs, qui pourraient médicaments pris), actuels et du traitement reçu et des santé (ainsi que de la nature compte des problèmes de curer des tâches tiendra L'aptitude médicale à exé-





**...sumer les frais reliés à  
médicale et à la déclaration?**  
ix engagés en vertu des dispositions du  
cal et qui ne sont pas couverts par le  
l d'assurance-maladie seront à la charge  
conformément aux directives provin-  
de facturation à une tierce partie.

**...un exemplaire du  
médical et des lignes  
ou encore, un complément  
n :**

**ale canadienne :** [www.cma.ca](http://www.cma.ca)  
**ienne des optométristes :** [www.opto.ca](http://www.opto.ca)  
**chemins de fer du Canada :** [www.railcan.ca](http://www.railcan.ca)

**ssible de téléphoner aux numéros suivants :**  
**canadien Pacifique**  
**au travail**

**chemins de fer nationaux du Canada**  
**au travail**

**a**

**chemins de fer du Canada**  
**président**  
**ffaires réglementaires**

## **Remerciements**

Le présent guide à l'intention des médecins et optométristes a été préparé par le groupe consultatif médical de l'Association des chemins de fer du Canada, et distribué avec la collaboration de l'Association médicale canadienne (AMC), l'Association canadienne des optométristes (ACO) et Transports Canada, dans le but d'assurer la sécurité du public dans le cadre du transport ferroviaire des marchandises et des voyageurs au Canada.

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